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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No.

HERMAN L. WOMACK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, [redacted], respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on January 12, 1961.

Citations to the Opinions Below

On the 12th day of January, 1961, the United States Court of Appeals for the District of Columbia Circuit, issued its decision and opinion affirming Petitioner's conviction by the United States District Court for the District of Columbia Circuit, on March 21, 1960, in Criminal Case Number 41-60. The case number in the United States Court of Appeals was 15749. (A-1a) (Record p. 219) Said Petitioner was convicted on twenty-six counts for violations of Title 18 U.S. Code Section 1461 (1958).

Jurisdictional Statement

The petitioner was indicted in a thirty-one count indictment for alleged violations of Title 18 U.S.C. Section 1461 in that in twenty-seven counts petitioner was charged with knowingly distributing circulars through the mails giving information where, how and from whom and by what means obscene materials could be obtained and in four counts petitioner was charged with knowingly sending through the mails obscene material, namely art photographs of nude males and females and an art book, "Classic Style."

The United States District Court for the District of Columbia had jurisdiction over this case. The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered January 12, 1961. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254.

Statement of Questions Presented

The questions presented by this appeal are:

1. Whether the District Court erred in failing to require the government to prove what matter would constitute "contemporary community standards" in the District of Columbia in the fields of art, nudism, photography, or in failing to allow the petitioner to prove to the jury what matter would constitute "contemporary community standards" in the District of Columbia in those fields.

2. Whether the District Court erred in refusing to allow expert witnesses presented by the defense to testify regarding what, in their opinion, consisted of "contemporary community standards" in the District of Columbia in those fields, or to testify as to the expert witnesses' opinion on obscenity of each individual exhibit in evidence and upon what basis that opinion was formed.

3. Whether the District Court erred in refusing to instruct the jurors that the effect of the photographs in evidence upon children, or particularly susceptible groups, is not decisive.

4. Whether the District Court erred in instructing the jury that the petitioner could be convicted, even though he believed the matter he placed in the mail was not obscene, and even

though he acted upon advice of counsel that his actions in that regard were legal.

5. Whether the District Court erred in failing to suppress on pretrial motion certain evidence from use at the trial, and admitting said matter into evidence over the petitioner's objections when said evidence was seized from the petitioner's place of business upon his arrest pursuant to a warrant of arrest, which warrant was supported by an affidavit which was insufficient on its face to assert probable cause for the petitioner's arrest and incidental search and there was no search warrant issued.

6. Whether the District Court erred in failing to dismiss the indictment upon pre-trial motion of the petitioner in violation of petitioner's rights under the First, Fifth and Sixth Amendments to the Constitution of the United States of America.

7. Whether the petitioner was denied the protection of the First, Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America because of the foregoing.

Statutes and Rules Involved

The pertinent statutes are Amendments I, IV, V and VI of the Constitution of the United States. (App. 6a)

Title 18 U.S. Code page 1461 (1958) (App. 7a).

Statement of the Case

The petitioner, Herman L. Womack, was indicted in a thirty-one count indictment with violating Title 18 U.S.C. Section 1461; twenty-seven counts of which involved the petitioner knowingly distributing circulars giving information where, how, from whom and by what means obscene material could be obtained and in four counts, namely 5th, 12th, 20th and 31st, with knowingly using the mails for conveying obscene matter. At the trial, counts 9 and 31 were dismissed by the Court upon motion of the Government at the close of the Government's case and petitioner was convicted by the jury on all of the remaining counts of the indictment on March 21, 1960. Thereafter, on April 14, 1960 the petitioner was sentenced by the United States District Court for the District of Columbia, to serve a sentence of from one to three years imprison-

ment on each count of which he was convicted, said sentences to run concurrently.

Reasons for Allowing the Writ

As petitioner views the trial of this case the strongest point to be considered by this Court, is what would constitute the "contemporary community standards" in the District of Columbia area, in the fields of art, nudism, and physique photography. As in every criminal case, the Government has the burden of proving beyond a reasonable doubt each and every element of the offense charged. In the case of Roth v. United States, this Court,per Justice Brennan, set down the test to be applied in judging obscenity compared with matter legitimately treating with sex. This test appears at 354 U.S. p. 489: "Whether to the average person, applying contemporary community standards the dominant theme of the material taken as a whole appeals to the prurient interests." In this Roth case, wherein this Court considered the constitutionality of Title 18 U.S. Code, Section 1461 prior to its 1958 Amendment, the majority clearly defined obscenity, fully and thoroughly. The ambit of the statute, then, cannot constitutionally be broader than the Court's definition of obscenity. **Petitioner,** however, does not argue that the statute treads any narrower path than the Constitution allows it. Therefore, in any obscenity prosecution, the material alleged to be obscene must be compared with and tested against what material constitutes and consists of the contemporary community standards of acceptance by the average person. If the alleged obscene material does not appeal to the prurient interest of an average normal, adult member of the community, it cannot be held to be obscene. In the trial of this case the Government at no time attempted to prove to the jurors what material would constitute the contemporary community standards in the fields of art, nudism, and physique photography. Petitioner attempted to show to the jurors what material would constitute pornography and obscenity in these fields, but the Court refused to allow the defense to show this type of matter to the jurors. (Tr. p. 281, et seq. JA 95, 96). If we assume that the jurors had never viewed pornography, how else would they be able to distinguish obscenity from non obscenity, if they were not permitted to compare examples of both types of materials.

The petitioner, himself a doctor of philosophy, past college professor of art and ethics (Tr. p. 377, et seq., JA 121, 122, 123), and a person whom the Court should have qualified as an expert witness in this field made a collection of examples of nude photographs, nudist magazines, books, works of art, demonstrating materials open for public sale in the District of Columbia and materials that are accepted by the Post Office and are conveyed through the United States mails (Tr. p. 381, et seq., JA 123-132), including Sunshine and Health Magazine, Defendant's Exhibit No. 3, for identification; Helios Magazine, Defendant's Exhibit No. 6, for identification, (a Danish language Nudist Magazine, which is imported into the United States, passing through the Customs censors), all of which collection was contained in Defendant's Exhibits for Identification, Numbers 2 through 27, which petitioner offered into evidence, in an attempt to prove what constitutes the contemporary community standards, and which the Court refused to admit into evidence (Tr. p. 389, JA 126); thereby prohibiting the jurors to view any standard whatsoever in determining what would be tolerated by the average person in this field. This action left it entirely to the test of what each individual juror in their past actions in life had experienced as the yardstick for the contemporary community standards of tolerance in these fields. The Court, surprisingly enough, took the view that nearly all of the material which the petitioner offered as examples of the contemporary community standards were illegal and merely had not been prosecuted. Needless to say, the Court was mistaken in that opinion. The Court also took the view as stated at a bench conference, that the only persons qualified to render an opinion as to what material would constitute contemporary community standards in this field would be a priest, rabbi or minister. The petitioner argues that that type of testimony undoubtedly would show what the contemporary community standards are for clergymen, but would in no manner shed any light upon what material would constitute contemporary community standards for the average, normal, adult, members of the community. The petitioner attempted to show the jurors what matter would constitute the contemporary community standards through the testimony of four expert witnesses whom the Court did recognize as experts in the fields of philosophy, psychology, and psychiatry. The Court, however, refused to allow these expert witnesses to testify as to

what in their opinions would consist of obscene material in this field, applying contemporary community standards (Tr. p. 415, et seq., JA 138-145), and actually the Court limited the experts' testimony, prohibiting the experts from rendering an opinion as to whether or not the material which appellant was charged with conveying through the mails was obscene. The Court merely permitted the experts to testify as to whether or not the material would appeal to the prurient interest of the average person. In reference to the last expert witness to testify for the defense, Dr. Wladimir Eliasberg, or any of the other expert witnesses, the Court refused to allow the petitioner to elicit from the expert witness the material, or the reasons upon which the experts based their opinion, and the Court refused to allow the expert witnesses to render an individual opinion as to each of the exhibits in evidence (Tr. p. 541, JA 185), but only allowed the experts to testify of their opinions of the exhibits as a group, without considering contemporary community standards. Petitioner feels that his constitutional rights to a fair trial should override the court's attempt to render the defendant a speedy trial.

The Court further stymied the defense, by interpreting this Court's opinion in the Roth case, as to the effect upon the average person of the material taken as a whole, by including children and particularly susceptible groups in its interpretations of what constitutes an average person. This leads to another point to be considered by this Court in this appeal. This Court in the Roth case, per Justice Brennan, 354 U.S. at pp. 488, 489, said: "The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex and it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." Further, Justice Harlan, in his dissenting opinion, at page 502, wrote: "I agree with the Court, of course, that the books must be judged as a whole in relation to the normal adult reader." The District Court, however, chose to place its own interpretation upon this Court's usage of the word "average". Throughout the trial and particularly in the District Court's instructions (Tr. pp. 573, JA 192; Tr. p. 657, et seq., JA 212, 213), the Court included in its interpretation of the average member of the Community, children and particularly susceptible groups. It is petitioner's position, and he argues that if we are to be confined to materials which would not appeal to the prurient interest of children

or particularly susceptible groups, our society is reduced to the acceptance of Mother Goose Rhymes as a limit of literature. The Court refused to grant petitioner's proposed instructions along those lines, said instructions having been taken from the text of Roth v. United States, and further the Court refused to grant the petitioner's request for the Court to follow the District Court instructions approved by this Court in Roth v. United States (Tr. p. 572, 573; JA 192). The appellant herein contends and argues that the District Court reverted in effect to the Hicklin test in its instructions to the jurors (JA 213).

Throughout the trial through the testimony of Postal Inspector Harry Simon (Tr. p. 331, et seq., JA 113, 114, 115; Tr. p. 342, JA 116); and of the petitioner himself, (Tr. p. 402, 405, JA 133, 134, 135; Tr. p. 479, JA 162; Tr. p. 481, JA 163; Tr. p. 524, JA 181), and Defendant's Exhibit No. 59, the Court was shown that the petitioner had been advised by competent counsel that there was nothing illegal in sending through the mails the materials for which he was charged and convicted, that the petitioner did not believe these materials to be obscene and did not know that they were obscene, and that the petitioner fully realized that the Postal Inspectors were receiving copies of everything that the appellant placed in the United States Mails. The Court instructed the jurors (Tr. pp. 659, 660; JA 213, 214) that these matters were irrelevant following the rulings of Rosen v. United States; Schindler v. United States, and Hornick v. United States. This permits a man to be convicted of a crime with which he is charged with knowingly having committed when he did not know or believe that he was committing a crime and certainly had no criminal intent. Petitioner recognizes that the three cited cases state what the law was but petitioner asserts that Smith v. California, 361 U.S. 147, should govern this particular case and this Court should decide that a man cannot knowingly commit a crime that he does not know, or believe, he is committing. On that same point, the Court refused to grant petitioner's motions for judgment of acquittal of Counts 16, 29, and 30 (Tr. p. 575, JA 193), which involves circulars advertising the petitioner's art instruction book, "Classic Style." This book was never introduced into evidence, although it was part of the charge involved in Count 31 of the indictment along with unretouched, nude female photographs. The Court stated that the issue was not one of what

was being sent through the mail, but one of whether the advertisement could be construed by the recipient as giving information as to where, how, and from whom, obscene material could be obtained (Tr. p. 654; JA 210; Tr. p. 662; JA 215, 216), and leaving the jurors to speculate upon the impression of the recipient of the envelopes as to their contents. Further, the Court asserted that it would not instruct the jurors that the petitioner's advertising material was not obscene, stating as basis for the Court's refusal that the recipient could consider the advertising material itself as obscene material, rather than merely advertisements where, how and from whom obscene material could be obtained, as alleged in the different counts of the indictment.

This leads us to the arguments relating to the denial of petitioner's pre-trial motions to suppress evidence (JA 10) and motion to dismiss the complaint (JA 19-33).

The Government presented this case in double barrel fashion. It opened, and fired its first shot, with an obvious attempt to prejudice the jurors' minds against the petitioner by producing teenage complaining witnesses who received advertisements but not photographs from the petitioner. Its second shot was an attempt by innuendo to convince the jurors that the petitioner was pandering to homosexuals; "McCarthyism" is the new word that has crept into our dictionary to describe this procedure. Through the testimony of Postal Inspector Harry Simon (Tr. p. 316, JA 109); and Postal Inspector James F. Kenny (Tr. p. 224, et seq., JA 75-79), the Government introduced letters written by the petitioner relating to magazines published by the petitioner (Tr. p. 228; JA 77), which had absolutely nothing to do with the petitioner's mail order art photograph business, "Continental Artists," or art instruction book, "Classic Style." These letters were admitted by the Court as supposedly showing scienter of the petitioner. We argue to this Court that there could be no showing of scienter, contained in these letters, because the letters did not in any way refer to the "Classic Style" or "Continental Artists" businesses of the petitioner, but only refer to a totally unrelated body builder magazine published by the petitioner. The contents of the letters were twisted by the Government to throw a homosexual issue into the case which the petitioner was forced to answer (Tr. p. 489; JA 166). This prejudicial maneuver, along with the Government's attempt to influence the jurors'

minds against the petitioner by alleging he was selling nude photographs to minors, illustrates the weak position the Government held, since the petitioner required all purchasers of photographs from him to certify their age as over 21 years before delivery was made to them.

The Government, through the testimony of Postal Inspector Harry Simon (Tr. p. 295, JA 101) identified and introduced into evidence certain cards (Tr. p. 304, JA 105) and photographs (Tr. p. 307, JA 106), which were seized from the petitioner's printing establishment at the time of his arrest pursuant to a warrant of arrest. The photographs which had been obtained by the petitioner through the use of a decoy letter (Tr. p. 484, et seq., JA 164), the same procedure followed by the Government in obtaining evidence against this petitioner were admitted in evidence by the Court to show scienter of the petitioner (Tr. p. 311, JA 107) and future intent (Tr. p. 652 and 653, JA 209, 210). This warrant of arrest was based upon an affidavit-complaint to the U.S. Commissioner filed by Postal Inspector Harry Simon which affidavit-complaint petitioner argues did not state probable cause for his arrest. The affidavit stated: "On or about August 10, 1959, at Washington, D. C., Herman L. Womack did knowingly deposit for mailing or delivery an envelope addressed to Paul Jay, Box 100, Wyoming, Delaware, containing lewd, lascivious, or indecent pictures; and the undersigned Postal Inspector has personal knowledge that the envelope in question bore the return address of the Postal Office Box rented by the defendant herein and that this envelope and the contents were personally received by the undersigned through official channels." The first half of the affidavit-complaint merely contained a recitation of the charge against the petitioner. The Postal Inspector who signed the affidavit-complaint merely stated therein that he only had personal knowledge that the envelope bore the petitioner's return address, and that the Postal Inspector had received the envelope and contents through official channels. There is no statement in the affidavit that the Postal Inspector ever viewed the content and considered same to be obscene or that the Postal Inspector ever permitted the U.S. Commissioner who issued the warrant to view the contents of the envelopes, so that the Commissioner could exercise independent, impartial, legal judgment whether the contents were or were not obscene. The Postal Inspector in the affidavit-complaint did not state that he had

personal knowledge that the petitioner knowingly deposited for mailing or delivery an envelope addressed to Paul Jay, Box 100, Wyoming, Delaware, containing lewd, lascivious or indecent pictures, and, therefore, petitioner questions upon what basis could the U. S. Commissioner who issued the warrant, find probable cause to believe that a crime had been committed, by the petitioner, on or about August 10, 1959. The decision of this Court in Giordenello v. United States, 357 U.S. 480, at p. 486, requires personal knowledge that a crime has been committed and that there is probable cause to believe that the petitioner committed that crime to be asserted in the complaint and further, requires that the U.S. Commissioner not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime. The U. S. Commissioner cannot rely upon any presumption that the complainant had personal knowledge that the crime was committed and that there was probable cause to believe that the petitioner had committed this crime. Therefore, we argue that the United States District Court should have granted "Defendant's motion to suppress the evidence and return same to the defendant." In addition thereto, we refer to United States v. Lefkowitz, 285 U.S. 452; United States v. Go-Bart Company, 282 U.S. 344; United States v. Gouled, 255 U.S. 298; United States v. Morrison, 262 F. (2) 449. The Court will please bear in mind that the investigation of the plaintiff had been in process for approximately ten months prior to his arrest and the petitioner, whenever requested to do so, would appear at the Post Office for conferences and the postal inspectors had been in the petitioner's place of business (Tr. p. 530, et seq., JA 182. 183), prior to the arrest and, therefore, we argue this arrest was so designed to allow a search incidental to the arrest which search could not have otherwise legally been obtained by means of a search warrant. There was no effort made to obtain a search warrant to support this evidentiary search and seizure.

Petitioner at pre-trial, filed a two point motion to dismiss the indictment (JA 19-33) which was denied. The petitioner includes said motion in this petition by reference herein and prays this Court to read and consider said motion as part hereof. The first point was that the 1958 Amendment to 18 U.S.C. Section 1461 is so vague and indefinite that it does not meet the due process requirement of the Fifth Amendment or that provision of the Sixth Amendment which entitles the

accused to be informed of the nature and cause of the accusation, in that the provision, as amended:

> "* * * Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this Section to be non-mailable, or knowingly causes to be delivered by mail, according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any said things from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter * * *"

The pertinent parts would read:

> "Whoever * * * knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed * * *"

Petitioner argues this language is not only vague and indefinite, but it is meaningless and unconstitutional since no person would be able to know with certainty whether or not he was committing an offense which was a violation of this provision of the United States Code. Therefore, 18 U.S.C. Section 1461, as amended, violates the Fifth and Sixth Amendments to the Federal Constitution.

The second point raised by pre-trial motion to dismiss is that the nude art photographs in evidence sent through the mails by the petitioner are not obscene. Artists, art historians, museum directors and an army of college professors dealing with the various arts, have through the ages been wholly unable to establish the criteria whereby art may be differentiated from trash. Any knowledge of the history of art supports the theory that there are absolutely no stable criteria by which the photographs in question can be declared to be without artistic merit and of no value to the practicing artist or art student persons having a constitutional right to receive same correlating petitioner's constitutional right to supply

same. This Court will notice in examining the photographic evidence that every model used by the petitioner portrayed a plain, simple nude figure comparable to those portrayed in Sunshine and Health and other nudist magazines, and comparable to the numerous nude photographs contained in defendant's exhibits for identification. In no photograph of a male nude is there depicted an erection of the male sex organ. In no photograph of a male nude is there depicted two models together. In no photograph of a male nude is there depicted a sexually inviting pose. The government at the trial urged the jurors to believe that when the sex organs were depicted in the center of the photograph that this was an attempt by the photographer to highlight the sex organ. Any freshman student of anatomy knows that the human body, if photographed fully erect, with the arms and legs outstretched, and with the circumference of a circle drawn by a compass around the extremities of the model, the exact center would be placed in the pubic area. Therefore, the government's suggestion is without basis in fact. In no photograph sold by the petitioner does any model have oil upon any part of his anatomy to highlight any feature of the photograph. A comparison with the photographs contained in Government's Exhibit 35 demonstrates this aspect. In no photograph sold by the petitioner is a model depicted in the process of an unnatural act or is there any action depicted in any of said photographs; which photographs sold by the petitioner to adult artists, art students and teachers, etc., must be judged to be exactly what they were intended for, substituting for live models for use of artists, art students, etc. (Tr. p. 370, et seq., JA 119-121). As indicated by the testimony of defendant's witness, Henry Papaso, these photographs are just as much a part of an artist's or art student's materials as an art booklet, a book on art instruction, oil paints, brushes and canvas, and are constitutionally protected under Roth v. United States. The District Court's charge, (Tr. p. 658, JA 213) "The jury must judge the material by present day standards of the community. The jury must ask itself 'does the material offend the common conscience of the community by present day standards' ", prohibited the jurors from viewing the photographs admitted in evidence in that light. This charge by the District Court amounted to the equivalent of that which "offends the sense of propriety, morality, and decency" of the average person of the community; the charge which caused the Solicitor General to confess error in Mounce v. United States, 355 U.S. 180,

petitioner argues, constituted error herein. Even the confused jurors, (Tr. p. 668, 669; JA p. 217) were further denied clarification of this point. The additional adjectives adding nothing to the averment that the matter petitioner mailed was "obscene," Roth case, page 491. Therefore, upon judicial consideration, the petitioner's nude art photographs when legally analyzed, cannot be found to be obscene; and the circulars advertising same cannot be found to be obscene, as a matter of law, since nudes, per se, are not obscene, Parmelee v. United States.

Conclusion

Petitioner urges this Court, upon consideration of the points raised in this petition, to reverse the judgment of the Court below.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 15749

Herman L. Womack, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court
for the District of Columbia

Decided January 12, 1961

Mr. Stanley M. Dietz for appellant.

Mr. Maurice R. Dunie, Assistant United States Attorney, with whom Mr. Oliver Gash, United States Attorney, and Mr. Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellee.

Before Wilbur K. Miller, Chief Judge, and Prettyman and Burger, Circuit Judges.

Prettyman, Circuit Judge: After trial by a jury in the District Court appellant was convicted on twenty-six counts of an indictment for mailing information as to where and how obscene, lewd, lascivious, indecent, filthy and vile matter could

be obtained, and on three counts for the actual mailing of such matter.[1] On this appeal he complains of error in the exclusion of evidence offered by him and the admission of evidence offered by the Government, illegality of his arrest and the search of his place of business, vagueness in the statute, insufficiency of the evidence against him, and error in the charge to the jury. We are of opinion no error occurred.

The evidence showed that appellant carried on a mail-order business in photographs. He solicited business by indiscriminately mailing proffers to names that he secured from various "physique" photographers. A card file containing 40,000 names was found in his office. In evidence was a letter signed by the appellant and sent to a business correspondent; in which he referred to a master mailing list as "the permanent sucker list." In another letter appellant wrote: "[A model], if he has been photographed properly, has the potential sex appeal and drawing power that is characteristic of so many of the * * models." And in the same letter he said: "In 1958, physique fans want their truck driver types already cleaned up, showered and ready for bed." A postal inspector testified Womack told him the pictures sold by a company of which he was the sole owner and operator "were intended for or that the purchasers were homosexuals."

The Government's first witness was a thirteen-year-old boy who had received in the mail, without solicitation or inquiry on his part, one of these proffers of photographs. He had handed the document to his father, who promptly notified the postal authorities. Other witnesses included boys nineteen, eighteen and fifteen years old, who had given their parents these advertisements. The circular required the prospect to sign a statement that he was an art student or art teacher, or engaged in some occupation that would involve a professional need for such photographs. This "prospectus" added that, if the recipient did not feel qualified as an art student, a home study course in figure drawing would be recommended to him. Womack admitted on the witness stand that he sent two circulars to the Boys' Club at a certain town.

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[1] The indictment contained thirty-one counts, but two counts were dismissed on the Government's motion at the close of its case. All were for violations of 18 U.S.C. § 1461 (1958).

Whatever may be the precise meanings of "obscene" and "filthy", or however broad or liberal community standards may be alleged to be, the photographs presented as Government exhibits in this case are within the definitions and outside the standards. No concept of art as art could include them. No concept of community standards could permit them.

Mr. Wigmore says:[2] "All evidential sources * * * are divided into three classes, namely, Testimonial, Circumstantial, and Autoptical." Concerning the latter he says:[3] "A fact is said to be evidence Autoptically when it is offered for direct perception by the senses of the tribunal without depending on any conscious inference from some other testimonial or circumstantial fact."

The photographs which are exhibits in this case are conclusive autoptical proof of obscenity and filth.

Although the dispositive question in Roth v. United States[4] was the constitutionality of anti-obscenity statutes, the Court there laid down some guide lines in other phases of the problem. Obscenity and filth have always lacked protection in our jurisprudence. The test given by the Court, and followed here by us, is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." And prurient interest, in the Court's definition, quoted from the Model Penal Code of the American Law Institute,[5] includes "morbid interest in nudity, * * * [which] goes substantially beyond customary limits of candor". The impact upon the average person is the criterion. The Court quoted with approval the instruction of the trial judge that the jurors judge the material by present-day standards of the community.

Most of the difficulty which enshrouds discussion of the law concerning obscenity and filth develops upon consideration of books and magazine articles. Here arise problems of scienter, the meaning and effect of the whole, the value of the work to proper interests of the public, the contemporary

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[2] WIGMORE, CODE OF EVIDENCE 42, § 200 (3d Ed. 1942).

[3] Id. at 44, § 207. See also 4 WIGMORE, EVIDENCE § 1150 (3d Ed. 1942).

[4] 354 U. S. 476 (1957).

[5] § 207.10(2) (Tent. Draft No. 6, 1957).

community standards in similar matters, and other baffling problems under our precious right of free speech, discussed in the several opinions in Smith v. California.[6] But we have no such problem in the case at bar. These are stark, unretouched photographs -- no text, no possible avoidance of scienter, no suggested proper purpose, no conceivable community standard which would permit the indiscriminate dissemination of this material, no alleviating artistic overtones. These exhibits reflect a morbid interest in the nude, beyond any customary limit of candor. They are "utterly without redeeming social importance."

The trial judge denied admission into evidence of dozens of books and magazines which contained nudes and which are regularly sold in ordinary commerce. We think he correctly did so. The proffered evidence was immaterial, i.e., of no probative weight in reaching a decision upon the issue at trial. The fact that nudes by Manet, Titian, Raphael, Rembrandt, Picasso, and many others are accepted commercial items is of no possible probative value in deciding whether these particular photographs, which alone are in issue here, are obscene and filthy. If a piece of cloth is bright red, and the cloth itself is in evidence, no testimony, lay or expert, would be admissible to show the cloth is blue. Such testimony would be immaterial, of no probative value, upon the issue of the color. Its admission would be a waste of the court's time, confusing, prolonging, and tending to make a mockery of the processes of justice. Mr. Wigmore treats of this topic in his discussion of relevancy, positing that one of the elements of relevancy is that the proffered evidence have something more than a minimum of probative value. Whether academically we call the principle materiality or relevancy, it is settled that to be admissible a bit of evidence must have some potential probative weight upon the issue of fact under trial. In the case at bar the photographs were filthy, self-evidently and indisputably. We think that photographs can be so obscene -- it is conceivably possible that they be so obscene -- that the fact is incontrovertible. These photographs are such.

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[6] 361 U.S. 147 (1959).

Apart from the foregoing, dispositive of the point is the fact that Womack made no attempt to show, as a foundation for his proffer, any resemblance between the proffered works of art and the photographs he was putting in the mail. The predicate for a conclusion that a disputed piece of mailed matter is acceptable under contemporary community standards, as shown by proffered other matter already in unquestioned circulation, must be that the two types of matter are similar. And as another part of his foundation he must show a reasonable degree of community acceptance of works like his own. The impossibility of such showing was fatal to the substance of Womack's case, and his failure to attempt it was a procedural fatality.

Appellant called as witnesses two psychiatrists and two psychologists and sought to have them testify as to contemporary community standards, but they failed to qualify as experts on the subject and the court refused to let them express opinions on the subject. Obviously the trial judge was correct upon the point. To be permitted to express an opinion as an expert, a witness must first qualify as an expert on the subject at issue. There was no showing or proffer to show that these witnesses did in fact know or had reliable means of learning what those standards were.

The court directed that these comparatively mild sentences run concurrently. Therefore the validity of the judgment upon one count, relating to one of these exhibits, supports the sentence. That doctrine is unnecessary in our disposition of the case, which we think can rest upon the validity of the judgment upon all counts; we mention it merely to note the magnitude of appellant's task in attempting to overturn the whole of the judgment against him.

Affirmed.

STATUTES

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 UNITED STATES CODE

§ 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and--

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing--

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. (June 25, 1948 ch. 645, §1, 62 Stat. 768, eff. Sept. 1, 1948.)

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No. 717

In the Supreme Court of the United States

OCTOBER TERM, 1960

HERMAN L. WOMACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 219–224;[1] Pet. App. 1a–5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961 (R. 225). The petition for a writ of certiorari was filed on February 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court was correct in excluding books and magazines available to the public, proffered

[1] "R." refers to the Joint Appendix filed in the court of appeals.

by petitioner to show community standards, and in refusing to allow testimony of psychiatrists and psychologists on this same issue.

2. Whether the trial court's instructions comported with the standards adopted in *Roth* v. *United States*, 354 U.S. 476.

3. Whether the warrant of arrest, incident to which a search was made, was valid.

4. Whether evidence of *scienter* was admissible.

STATEMENT

Following a jury trial held in the United States District Court for the District of Columbia, the petitioner was convicted on each of 29 counts of a 31-count indictment (R. 1–9),[2] charging that he knowingly distributed through the mails obscene photographs, (counts 5, 12, 20) and circulars and advertisements giving information as to how and where obscene photographs might be obtained (counts 1–4, 6–8, 10–11, 13–19, 21–30) (R. 218). The petitioner was sentenced to a term of imprisonment of 1 to 3 years on each count, to run concurrently (R. 218). The court of appeals unanimously affirmed the conviction (R. 219–224; Pet. App. 1a–5a).

1. The pertinent evidence adduced at the trial by the government revealed that petitioner, under the name Continental Artists, conducted a mail order business out of Washington, D.C., soliciting orders for, and distributing photographs of, nudes through

[2] Counts 9 and 31 were dismissed on the government's motion at the close of its case (R. 115, 206).

the mails (R. 103).[3] Among the recipients of unsolicited advertising material from Continental Artists—containing samples of male and female nude photographs with the pubic areas draped (See Gov. Exs. 1–4, 6)—were David Morrow, age 13, Butler, Pennsylvania (R. 41–42), David G. Shaub, age 19, Stamford, Connecticut (R. 45–49), Judson E. Hodges, Jr., age 18, Lynnhaven, Virginia (R. 51–52), and Albert Crane, Jr., age 15, Salt Lake City, Utah (R. 56–57).[4] Postal inspectors Kenny and Simon, under various fictitious names, also received the advertising material sent out by petitioner (see, *e.g.*, R. 72–75, 79–81, 86–88, 91, 93; Gov. Exs. 13–15, 17, 20–32). Inspector Simon, on May 18, 1959 (count 5), under the test name Allen Spencer, purchased a set of photographs of undraped male nudes from Continental for $10 (R. 83–84, 88; Gov. Ex. 18). On other advertising material mailed to "Spencer", a set of 12 prints of male nudes was listed at a price of $25 (R. 94–96; Gov. Ex. 26).

Also introduced into evidence without objection on the issue of *scienter* was a letter dated October 14, 1959, written by petitioner under the letterhead of

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[3] Petitioner also operated out of Washington, D.C., under the names "Classic Style" and "Potomac Associates." He owned the magazines "Trim", "Physique", and "Manual", and published "Grecian Guild Pictorial" (R. 82, 99, 101–103, 117–118, 132).

[4] Other similar unsolicited advertising materials was mailed by Continental Artists, to Eleanor Gullery, Chicago, Illinois (R. 58–61; Gov. Ex. 7), Myron M. Sager, Accokeek, Maryland (R. 61–63; Gov. Ex. 8) and to the Boys' Club, Ypsilanti, Michigan (R. 176–177; Gov. Exs. 37–38).

"Trim, Young America's Favorite Physique Publication", Post Office Box 385, Washington, D.C., to "Male Today", a New York Publication (R. 75–76). In this letter dealing with the exchange of mailing lists, petitioner wrote: "Could we save each other money, have enough duplicate stickers made, so that you can send me two sets of each list, and I will do the same. In that way, we have one for immediate mailing and one for the permanent sucker list. Thus we will both save extra typing expense" (R. 76; see also R. 77–78).[5] Agent Kenny testified that he had heard the phrase "sucker list" used quite frequently in his investigations into the mailing of obscene material, and stated that it referred to persons who are "willing to spend any amount of money to purchase this type of picture" (R. 78–79).

Inspector Simon testified that on June 3, 1959, he had a conversation with petitioner concerning the magazines "Trim" and "Physique", and that petitioner commented that "we are adults, we don't have to kid each other, we know who is interested in magazines and pictures of that type," and that "pictures sold by Continental Artists and the magazine Trim were intended for or that the purchasers were homosexuals" (R. 102–103).[6]

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[5] Petitioner had a circulation list of some four thousand names, which he had said was worth $10,000 to him (R. 181).

[6] Over petitioner's objection, a letter written by petitioner dated September 10, 1958, under the letterhead of "Trim" to "Mercury Photographic Service", Norfolk, Virginia, was introduced in evidence on the issue of *scienter* (R. 109–113). This letter dealt with various male models and their appeal,

2. Petitioner called two psychologists, Dr. Earl Davy and S. Gordon Link, and two psychiatrists, Drs. Michael M. Miller and Wladimir Eliasberg, as witnesses. They testified that, in their opinions, the dominant theme of the material mailed by petitioner (specifically Gov. Exs. 11, 12, 18), taken as a whole, would not appeal to the prurient interest of the average person (R. 146, 155, 158, 186). Dr. Davy was not permitted to testify to his opinion as a psychologist as to "whether to the average person, applying contemporary community standards, the material you have just examined would appeal to the prurient interest of such person," for the trial judge noted that "[w]e don't know what standards the witness would apply" (R. 138–139).

Petitioner also sought to introduce into evidence various magazines and books containing photographs of male and female nudes to show "what the contemporary community standards are" (R. 124–125). The trial court excluded this material as irrelevant, pointing out that the "jury has to decide whether this series of publications, this material, is or is not obscene. The mere fact that some other material can be picked up on the newsstands, for example, or may be sent through the mails that is equally bad, or equally good, whichever way you put it, is not evidence" (R. 125; see also R. 126–128, 130–131).

3. The trial judge charged the jury on the standard

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stating, in part, that "physique fans want their truck driver types already cleaned up, showered, and ready for bed" (R. 112–113).

it was to apply in determining obscenity in pertinent part, as follows (R. 212–213):

> * * * The test of obscene matter, as laid down by law, is whether the particular material or publication in question charged to be obscene * * * would, to the average person, applying contemporary community standards, convey a dominant theme that the material being taken as a whole, would appeal to what is known as the prurient interest. * * *
>
> The test is whether the material would arouse sexual desires or sexually impure thoughts in the average person or in all those whom it is likely to reach. The test in each case is the effect of the publication considered as a whole, not on any particular class or any particular group, but upon all those whom it is likely to reach.
>
> * * * * *
>
> The jury and the jury alone, are the exclusive judges of what the common conscience of the community is, and what the present-day standards of the community are. And in determining the conscience of the community, the jury is to consider the community as a whole, the young and the old, educated and uneducated, religious and irreligious, man, woman or child.
>
> * * * * *
>
> In other words, the question is not whether every portrayal of a nude human body is or is not obscene. The question is whether the particular pictures or photographs depicting the

nude human body in the particular manner in which they are depicted in these pictures or photographs are obscene.

* * * * *

ARGUMENT

1. Petitioner principally argues that it was reversible error for the trial court to exclude photographs, magazines, books and other publications relating to nudity, available to the public in the District of Columbia, which petitioner sought to introduce to show that, under contemporary community standards, the material he had distributed through the mails was not obscene. Although the proper proof of contemporary community standards may be admissible (see *Smith* v. *California,* 361 U.S. 147, 164–167, 171–172 (concurring opinions)), it does not follow that, because certain material is publicly sold in a particular community, its nature and content by itself, without proper selectivity and guidance, provides a fair index of the community consensus of what is or is not obscene. Thus, it may well be that the material sought to be introduced for comparison purposes is in and of itself obscene (see the comments of the trial court in excluding the comparison material, R. 124–130). It may also be that, irrespective of its merit or lack of merit, the material is not fairly comparable to that which is charged to be non-mailable. In this case, for example, the works of art which petitioner sought to introduce for purposes of comparison were totally dissimilar to the material petitioner had mailed. As the trial judge noted, it is

not the depicting of a nude figure which is the test of prurience, but how the figure is posed and portrayed in the particular circumstances (R. 129–131). In so ruling, the trial court by no means held that such comparative material was irrelevant under all circumstances (compare *Smith* v. *California, supra,* 361 U.S. at 165 (Frankfurter, J., concurring)). But the introduction of such material, without guidance by one qualified to select the material properly or explain it adequately, would have tended to confuse, rather than clarify, the task of the jury. Without such guiding testimony, not only would the jury have had to make particular judgments as to whether the comparison material actually mirrored community morality, but the jury would also have had to determine in each instance whether the comparison material was actually comparable to the material challenged as obscene. Since petitioner proffered the comparison material without adequate expert guidance, the trial court was correct in refusing to impose the onerous burden upon the jury by admitting the material. See *United States* v. *Hochman,* 175 F. Supp. 881, 882, affirmed, 277 F. 2d 631 (C.A. 7), certiorari denied, 364 U.S. 837; *United States* v. *Levine,* 83 F. 2d 156, 158 (C.A. 2); *Clarke* v. *United States,* 160 A. 2d 97, 98 (D.C. Mun. Ct. of Appeals); *Commonwealth* v. *Donaducy,* 167 Pa. Super. 611, 614–615, certiorari denied, 341 U.S. 949.

Petitioner asserts further that he was foreclosed from inquiring of his expert witnesses what, in their opinions, would be obscene material under prevailing

community standards.[7] The record reveals that his four expert witnesses—two psychologists and two psychiatrists—were permitted to testify whether, in their opinions, the dominant theme of the challenged material appealed to the prurient interest of the average person (see the Statement, *supra*, p. 5). Only when petitioner sought to inquire of Dr. Davy whether the material under indictment would appeal to the prurient interests of the average person, "applying contemporary community standards," did the trial judge exclude the question (see R. 138–139). This ruling was correct, and there is no occasion to review the trial judge's determination. Clearly the trial court did not exclude the testimony on the ground that no expert under any circumstances was competent to testify to such matters (compare *Smith* v. *California*, *supra*, 361 U.S. at 165, 166–167; A.L.I. Model Penal Code, Tentative Draft No. 6, § 207.10(2); Obscene Publications Act, 1959, 7 & 8 Eliz. 2, Ch. 66, § 4). In the present case, however, the standards of the community were outside the scope of the known expertise of these particular witnesses.[7] While it may be that as experts in the sciences of psychology and psychiatry they were qualified to express expert opinions as to the reactions of individuals who might view the photographs petitioner had mailed, they were not shown to be possessed of any particular knowledge permitting them to testify on the intellectual and moral climate

[7] As for petitioner himself, he was qualified as an expert in philosophy, not in a discipline which would permit his own testimony on community standards (R. 121–123).

of the community.[8] Hence, there is in this case no issue as to whether a witness who has been qualified as an expert in sociology or in any other discipline particularly concerned with community mores should be permitted to testify on community standards. No such qualified experts took the stand. To the extent that experts did take the stand and testify, they were allowed to state information pertinent to matters shown to be within their professional competence.

2. Petitioner next contends that the trial judge failed to instruct the jury in accordance with the standards of *Roth* v. *United States*, 354 U.S. 476, particularly insofar as the court emphasized the importance of the prurient appeal of the material to children and particularly susceptible persons. The charge does not bear out this complaint. The court affirmatively directed the jury that "[t]he test in each case is the effect of the publication considered as a whole, not on any particular class or any particular group, but upon all those whom it is likely to reach" (R. 213). And again (*Ibid.*):

> * * * the jury is to consider the community as a whole, the young and the old, educated and uneducated, religious and irreligious, man, woman, or child.

In all significant respects the charge here comported with the *Roth* standard.

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[8] Petitioner asserts further that he was not permitted to elicit from Dr. Eliasburg the reasons for his opinion. The facts show to the contrary that Dr. Eliasberg was asked for and gave the reasons for his opinion (R. 186).

Petitioner also argues that the question of obscenity should not have gone to the jury at all since the photographs were not obscene as a matter of law. An examination of the photographs (see Gov. Exs. 11, 12, 18) will reveal that the issue of obscenity was properly left to the jury and that it had ample reason to find the material non-mailable.

3. There is no merit to petitioner's claim that illegally obtained evidence was admitted against him on his trial. Prior to trial, petitioner moved for suppression and return of his entire mailing list seized from his business premises following his arrest therein on January 5, 1960, under a warrant of arrest, on the ground that the search "was not made to obtain evidence but was made with the purpose of seizing defendant's mailing list in an effort to prevent the defendant from continuing his magazine publishing operations * * *" (R. 10–11). The government opposed this motion, pointing out that, following the receipt of numerous complaints by the Post Office Department in February 1959, an investigation was commenced which provided probable cause for the obtaining of an arrest warrant, and that the seizure was incident to that arrest (R. 11–12, 16–18). On February 1, 1960, prior to the commencement of the trial, the court ordered return of petitioner's mailing list except for the "approximately seventeen cards relating to the names and addresses referred to in the indictment herein * * *" (R. 18).

Petitioner now contends that the affidavit of postal inspector Simon in support of the warrant of arrest

was insufficient in that, although it stated that petitioner deposited for mailing, on August 10, 1959, an envelope containing "lewd, lascivious, or indecent pictures" and that the affiant personally received the envelope and its contents, it failed to state that the inspector examined the photographs or considered them obscene (Pet. 9). This argument assumes that the obvious must be spelled out in punctillious detail. The thrust of the affidavit is that the inspector examined the pictures and believed them to be obscene. The warrant of arrest was therefore valid, and the search and seizure incident thereto proper. See *United States* v. *Rabinowitz,* 339 U.S. 56; *Abel* v. *United States,* 362 U.S. 217.

4. Petitioner further claims (a) that he was unfairly prejudiced by the fact that the government produced teen-age witnesses who received his advertising material; (b) that certain letters he had written unrelated to the events in the indictment were introduced in evidence; (c) that the trial court erred in instructing the jury that it was immaterial whether or not petitioner believed the material to be obscene, as long as he knowingly mailed it with knowledge of its content; and (d) that 18 U.S.C. 1461, as amended in 1958, is unconstitutionally vague. None of these arguments has merit.

(a) The present case went to the jury on a 29-count indictment. Each count charged a separate mailing in violation of 18 U.S.C. 1461, and each of the teen-age witnesses who testified for the government had received circulars from petitioner giving information

as to where and how obscene material might be purchased (see the Statement, *supra*, p. 3). Manifestly, the testimony of each of these recipients was essential for the government to prove its case.

(b) The letters which were introduced in evidence were written by petitioner under the letterhead of "Trim", a magazine owned by him and one of his many outlets for the distribution of nude photographs (R. 82, 99, 101–103). Since these letters tended to reveal petitioner's activities as those of a commercial operator in obscenity (R. 75–76, 172–173), they were clearly admissible to show the guilty knowledge required by the statute. See *Roth* v. *United States*, *supra*, 354 U.S. at 494, 495–496 (conc. ring opinion of Mr. Chief Justice Warren).

(c) The trial judge was correct in instructing the jury that it was immaterial whether petitioner believed that the publications he mailed were obscene, for clearly there is a vast difference between the requirement of *scienter* (see *Smith* v. *California*, *supra*) and the question of petitioner's opinion that the material he had mailed was not obscene. As the judge properly charged: "[I]f the jury find that [the material] was obscene and was deposited in the mail or was caused to be deposited in the mail by the defendant, and the defendant knew its contents, the offense is complete * * *" (R. 214). See *Rosen* v. *United States*, 161 U.S. 29, 42; *Roth* v. *United States*, *supra*, 354 U.S. at 491.

(d) Petitioner's claim that 18 U.S.C. 1461, as amended in 1958, is unconstitutionally vague is pre-

cisely the same argument which was raised in *Collier* v. *United States*, No. 571, this Term, certiorari denied, March 6, 1961. As in that case, the amendatory language challenged by petitioner—"whoever * * * knowingly causes [non-mailable matter] to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed * * *"—is not pertinent here since petitioner was tried in the District of Columbia, the place from which he mailed the allegedly obscene material. Insofar as applicable to the present case, the constitutionality of 18 U.S.C. 1461 was upheld in *Roth* v. *United States*, 354 U.S. 476, 490–491. See the Government Brief in Opposition, No. 571, this Term, pp. 5–6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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